No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,

Appellant and Cross-Appellee,

vs.

RAYMOND M. CRANE, doing business as Associated Fruit Distributors,

Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Packing Company, a corporation,

Appellee.

OPENING BRIEF OF APPELLANT JOSEPH DENUNZIO FRUIT COMPANY.

FILED

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Jurisdictional Statement.

This case involves an award by the Secretary of Agriculture under the Perishable Agricultural Commodities Act (7 U. S. C. A. 499).

Upon amended complaint by Joseph Denunzio Fruit Company [Tr. p. 17 *et seq.*] hereinafter referred to as "Denunzio," and upon answer by Raymond M. Crane, doing business as Associated Fruit Distributors [Tr. p. 49 *et seq.*] hereinafter referred to as "Crane," and answer by John C. Kazanjian, doing business as Red Lion Packing Company [Tr. p. 53 *et seq.*] hereinafter referred

to as "Kazanjian," a formal hearing was had before a judicial officer appointed by the Secretary of Agriculture under the provisions of the Perishable Agricultural Commodities Act, 7 U. S. C. A., Section 499f. Upon this hearing, the Secretary of Agriculture made an award in favor of Denunzio and against Crane to the effect that Crane shall pay Denunzio as reparation $5,723.50 with interest thereon at 5% per annum from December 10, 1944, until paid [Tr. p. 79 *et seq.*]. The complaint was dismissed as to respondent Kazanjian.

From this award of the Secretary of Agriculture, Crane appealed to the United States District Court for the Southern District of California under the provisions of the Perishable Agricultural Commodities Act, 7 U. S. C. A., Section 499g, Subdivision (c). A trial *de novo* was had in the United States District Court with the Findings of Fact and Order of the Secretary constituting *prima facie* evidence of the facts therein stated, as provided in the above cited provision of the Perishable Agricultural Commodities Act. As a result of such trial, the Honorable J. F. T. O'Connor presiding, affirmed the award of the Secretary of Agriculture [Tr. p. 150 *et seq.*].

Crane then made a motion for a new trial, and upon the decease of the Honorable J. F. T. O'Connor, the matter was assigned to the Honorable James M. Carter. Upon hearing the motion for the new trial, the court vacated the Conclusions of Law and Judgment theretofore made by the court and entered judgment setting aside the award of the Secretary of Agriculture [Tr. p. 180 *et seq.*].

From the judgment on granting motion for a new trial, both Denunzio and Crane appealed [Tr. pp. 185 and 186].

The appeals are taken to this court from the final decision of the District Court under the provisions of 28 U. S. C. A., Section 1291.

Statement of the Case.

Findings of Fact were made by the Secretary of Agriculture [Tr. p. 71 *et seq.*] and by the Honorable J. F. T. O'Connor, United States District Judge [Tr. p. 139 *et seq.*]. The Honorable James M. Carter did not make Findings of Fact but reviewed the case, without a transcript, solely on questions of law [Tr. p. 170].

The salient facts in the case, as shown by the Findings of Fact, are as follows:

The four persons involved in the transaction out of which this case arose are Crane, licensed under the Perishable Agricultural Commodities Act, as a broker and car lot distributor with offices in Los Angeles; Kazanjian, a grower and packer of grapes at Exeter, California; Denunzio, with offices at Louisville, Kentucky, a car lot receiver and wholesaler; and one A. B. Rains, Jr., with offices at Louisville, Kentucky, a food broker.

The dispute in question arose primarily by virtue of telegrams and teletype messages exchanged between Crane in Los Angeles and Rains in Louisville. These messages were in "speed code" used to facilitate the interchange of messages between brokers, sellers and purchasers. For the convenience of this court, the de-coded messages, in chronological order, are set forth in full as Appendix A to this brief. The coded messages are set forth in the transcript beginning page 31. A résumé of these messages and the other transactions resulting in this dispute is as follows:

1. Original Offer.

On or about September 26, 1944, Kazanjian advised Crane that he had some grapes to offer for sale [Tr. p. 70].

Thereupon, on September 26, 1944, Crane sent a form night letter to thirteen brokers in various parts of the United States, including A. B. Rains [Tr. p. 201], in which he stated he could book nine cars of U. S. One and nine cars of unclassified Emperor grapes at a price of $2.53 net to shipper "we charging $50.00 per car procurement charge—offer subject to confirmation."

2. Counter Offer by Denunzio.

On September 28, 1944, Rains made a counter offer to Crane by teletype wherein he stated that Denunzio would take two cars of unclassified and two cars of U. S. One to be stored there on Crane's terms and to pay him $50.00.

3. Rejection of Counter Offer.

By night letter telegram dated September 28, 1944, Crane rejected Denunzio's counter offer.

4. Revised Offer.

Then on October 2, 1944, Crane telegraphed Rains and other brokers that in reference to his night letter of September 26th quoting futures on Emperors, he had secured a revised deal and that he could sell fifteen cars of U. S. No. One Emperor grapes on the same basis with respect to packing, storing, shipping and inspection as set forth in the original wire, but at a price of $2.50 per lug net.

5. Acceptance of Revised Offer.

By teletype on October 3, 1944, Rains accepted on behalf of Denunzio for three cars of U. S. No. One Emperors to be inspected when stored and inspection slips airmailed, $750.00 per car deposits to be put up contingent upon receiving inspection reports when the grapes are stored.

6. Confirmation of Acceptance.

By immediate reply teletype, Crane confirmed Denunzio's acceptance.

7. Subsequent Reduction of Contract to Formalized Agreement "Brokers Standard Memorandum of Sale."

Thereupon, on October 3, 1944, Rains prepared in triplicate a broker's standard memorandum of sale No. 2011 confirming the transaction and sent the "Seller's" copy to Crane. At the top of this standard memorandum of sale appears the following statement:

> "When the terms of sale have been agreed upon, the broker shall fill out this standard memorandum of sale in triplicate, sending one copy to the seller, one to the buyer and retaining the third copy for his own file. Unless the seller or the buyer makes immediate objection upon receipt of his copy of this standard memorandum of sale, showing that contract was made contrary to authority given the broker, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully and correctly stated." [Tr. p. 29.]

The standard memorandum of sale shows the sale to Joseph Denunzio Fruit Company, sold for account of Associated Fruit Distributors, and states the sale to be:

> "Two cars U. S. #1 California Emperors per lug F.O.B. net $2.50 to be packed around October 8th to 10th and stored in cold storage title to remain in shipper's name until December 10th $750.00 per car deposit to be made upon receipt of confirmation from California by airmail—contingent upon cars grading U. S. #1 28 lb. net new display lugs."

8. Correction of Memorandum of Sale.

On October 9, 1944, Rains sent a telegram to Crane stating that in reference to sales memo 2011 there was an error and it should read three cars instead of two cars.

9. Correction Accepted.

Crane replied by telegram to Rains on the same date accepting the correction of No. 2011, adding a further correction that the terms are F.O.B. acceptance final and stating that "if you do not wire immediately to the contrary, we will understand this is satisfactory." No further telegram or other communication was sent by either party concerning these corrections.

10. Removal of Price Ceilings.

On October 10, 1944, the Office of Price Administration removed all maximum price restrictions from table grapes.

11. Repudiation of Contract on Behalf of Kazanjian.

On October 10, 1944, Crane sent to Rains the following telegram:

> "Shipper Red Lion takes view account ceiling lifted any contracts Emperors voided. Willing go along give you trade preference shipping as packed at market price which today $3.25 F.O.B. acceptance final. Advise."

To this, Rains telegraphed to Crane on October 11, 1944, as follows:

> "Baloney. Emperors confirmed $2.50 net. No mention ceiling. Denunzio Krotzki demands shipment or fight him to end . . ."

12. Repudiation of Contract by Crane.

On October 13th, Crane sent a telegram to Rains stating that because the deal was "F.O.B. acceptance final not F.O.B." there was really no contract. (Actually this point had been straightened out in the exchange of telegrams October 9th.)

No settlement was reached. By October 12th, the price was up to $3.40 per lug [Tr. p. 39] and it continued to climb.

This was an anticipatory breach of a sale to take place on or about December 10, 1944. Until that date, Denunzio endeavored to force compliance with the contract and sought the aid of the Department of Agriculture to force such compliance. After December 10th, when the breach actually occurred, Denunzio went out into the open mar-

ket and as soon as possible and at the best market price obtainable bought other grapes as replacements for those not shipped by Crane. Three cars were purchased at a total purchase price of $14,011.00, which sum exceeded the contract purchase price for the three cars by $5,723.50.

Denunzio petitioned the Secretary of Agriculture for reparation in the amount of its loss because of the failure of Crane or Kazanjian to perform in accordance with the agreement. Crane and Kazanjian answered separately but in essence set up the defense that no enforceable contract was ever concluded.

For the first time after appeal to the District Court, Crane set up his contention that if a contract was in fact concluded, it was illegal as being in excess of O.P.A. ceilings.

Since Judge O'Connor found that a contract was concluded between Denunzio and Crane and these Findings were not disturbed by Judge Carter, this appeal by Denunzio does not involve those points.

This appeal by Denunzio involves only the conclusions by Judge Carter (a) that the contract between Crane as agent for an undisclosed principal and Denunzio violated the Emergency Price Control Act and maximum price regulations *in toto*; (b) that consequently such contract was totally unenforceable; and (c) because of conclusions (a) and (b) above, the judgment of the District Court made by Judge O'Connor was legally unsupportable and must be set aside.

Specification of Errors.

1. The lower court erred in its Conclusion of Law No. 1 that the motion for a new trial filed by Crane should be granted and an order should be made herein setting aside, vacating and annulling the Findings of Fact and Conclusions of Law and Judgment signed and filed herein on the 21st day of July, 1948.

2. The lower court erred in its Conclusion of Law No. IV in determining the veiling price for said grapes to be $2.50 per lug and in failing to segregate the consideration payable to the principal, Kazanjian, and the additional compensation claimed by the agent, Crane.

3. The lower court erred in its Conclusion of Law No. V concluding that the contract referred to in Paragraph II of the Findings of Fact was unlawful and void under the Emergency Price Control Act of 1942 as amended.

4. The lower court erred in its Conclusion of Law No. VI concluding that the contract referred to in Paragraph II of the Findings of Fact was illegal and void and that no further proceedings thereunder should be had.

5. The lower court erred in its Conclusion of Law No. VII that Crane and Kazanjian are entitled to judgment against the complainant Denunzio to the effect that Denunzio take no relief under the cause of action set forth in its complaint.

6. The lower court erred in entering judgment on May 19, 1950 (on granting motion for a new trial) vacat-

ing and annulling and setting aside the Findings of Fact, Conclusions of Law, and Judgment signed and filed in these proceedings on July 21, 1948, and further determining that the contract referred to in Paragraph II of the Findings of Fact is void and in ordering, adjudging and decreeing that complainant Denunzio take no relief as against respondent Crane, and as against respondent Kazanjian.

Summary of Argument.

Judge Carter set aside the Judgment in this case made by Judge O'Connor solely on the grounds that the contract between Crane as agent for an undisclosed principal and Denunzio was in violation of the Emergency Price Control Act of 1942, and unenforceable.

We believe this conclusion was wrong:

1. Because Judge Carter erroneously determined that the applicable price ceiling was $2.50 per lug instead of $2.53 per lug.

2. Because the applicable price ceiling being $2.53 per lug, a contract calling for a purchase price of $2.50 per *lug* and providing for $50.00 per *car* brokerage is not on its face in violation of the law. A contract is presumed to be lawful and if on its face it is not unlawful, then it is up to the party claiming its invalidity *to introduce evidence* to prove that contention. Illegality should not be presumed or arrived at by implication.

3. If it be assumed or deduced to the satisfaction of this court that $2.50 per lug plus $50.00 per car amounted to more than the applicable ceiling price; still it does not follow that the contract as a whole is unenforceable because:

(a) The Emergency Price Control Act sets forth the penalties for its violation; such penalties do not include unenforceability.

(b) When the violation of the Emergency Price Control Act is of a technical, unintentional and exceedingly minor nature the court should not apply a remedy other than that provided by the Act itself.

(c) The brokerage of $50.00 per car is not earned or payable until the broker has brought about a contract between the principals; therefore, the $50.00 per car is a secondary contract which if payable at all must be *added* to the basic contract. It is therefore the *added* commission that is the illegal portion of the contract. Since there is a separate consideration that supports this promise, it is severable and the remaining legal portion of the contract may be enforced.

ARGUMENT.

I.

The Applicable Maximum Ceiling Price for Emperor Grapes was $2.53 Per Lug, Not $2.50 Per Lug.

Judge O'Connor in his Findings found the applicable maximum ceiling price to be $2.53 per lug [Finding of Fact II, Tr. p. 140]. Judge Carter, on the other hand, in his opinion, held the applicable maximum ceiling price to be $2.50 per lug [Tr. p. 166]. If the ceiling price were $2.50 per lug, then an added procurement charge of $50.00 *per car* would of necessity make the total price over the legal ceiling. In such case, the illegality would be apparent on the face of the contract. On the other hand, if the applicable ceiling price was $2.53 per lug, then a contract requiring a price of $2.50 per lug plus a procurement charge of $50.00 *per car* would not be illegal on its face. Under such circumstances, it would be up to the party contending that such a contract was illegal to raise this as an affirmative defense and to prove that on the basis of the car-loadings contemplated under the contract, $50.00 per car amounts to more than 3¢ per lug. This the respondent Crane failed to do.

The regulation of the Office of Price Administration applicable to this contract was MPR 426, Amendment 46, August 2, 1944. The second page of this regulation sets forth the basic price for "table grapes produced in all other areas (other than Riverside and Imperial Counties of California and in Arizona) and packed in lug boxes (WPB L 232 No. 46) with a net weight of 28 lbs. or

more, sold between December 11th and the end of the season at $2.40 per lug. This far all parties interpret the regulation the same.

The third page of the regulation provides for "maximum mark-ups for distributive services performed by grower-packers, shipping point distributors, and their agents to be added to the applicable maximum price F.O.B. shipping point or the maximum delivered price, as the case may be." Column 2 gives the commodity—"table grapes"; column 3 gives the unit—"lug book (box) with a net weight of 28 lbs. or more"; columns 8 to 12, inclusive, provide for "sales by *any person* (including grower-packers) through a growers' sales agent and sales by shipping point distributors"; column 8 provides for mark-up in case of "direct sales (without the use of broker or any other agent)" and provides for a mark-up of 10¢; column 9 provides for mark-up for a sale "through a broker or salaried representative in any quantity, or through a commission merchant in car lots or truck lots" of 13¢ per lug. It is obvious that column 9 indicates the proper mark-up in the present situation where the sale was handled in car lots through commission merchant respondent Crane. Therefore, it is apparent that the ceiling price applicable to this transaction was $2.53.

II.
A Contract Is Presumed to Be Lawful.

Section 1643 of the Civil Code of California provides as follows:

> "A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

In *Howard v. Adams,* 16 Cal. 2d 253, at page 256, 105 P. 2d 971, 130 A. L. R. 1003, the court states:

> "The principal contention urged on this appeal is that the agreement was void as against public policy and therefore the trial court erred in permitting plaintiff to recover upon it. Bearing in mind the rule that a contract should, if possible, be construed to make it valid and enforceable, we cannot agree that illegality is established."

The law presumes in favor of the validity of contracts. This has been the law in California since *Shaver v. Bear River and Auburn W & M Company,* 10 Cal. 396 (1858).*

Parties are to be given the widest latitude to make contracts with reference to their private interests and the invalidity of such contracts is never to be inferred, but must be clearly made to appear. (*Herriman v. Menzies,* 115 Cal. 16, 44 Pac. 660, 35 L. R. A. 318.)

All intendments being against fraud and in favor of fair dealing, it will not be presumed against any writing that it contemplates a violation of the law, unless that conclusion becomes irresistible from the very reading of the instrument. (*Wood v. Woods Estate,* 137 Cal. 148, 69 Pac. 981.)

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*Counsel stipulated that the substantive law of the State of California (statutory and case) shall control [Tr. p. 96].

III.

If the Illegality Does Not Appear Upon the Face of the Contract, Then It Must Be Alleged and Proven.

In *Bernard v. Sloan,* 2 Cal. App. 737, 84 Pac. 232, the law is stated at page 748 as follows:

> "The claim of the defendants that their contract with Braslan is illegal, by reason of being in restraint of trade and against public policy, is not pleaded in their answer in such a mode as to present such defense. Parties are allowed great latitude and freedom of action in making contracts with each other, and no presumption can be indulged that a contract which has no semblance of illegality in its terms is violative of any law."

In this brief, we are not speaking of a situation in which illegality is apparent upon the face of the contract. If such illegality is apparent, then the court itself may refuse to entertain the action. We are speaking of a situation in which a reading of the contract alone will not disclose any illegality.

In *Grimes v. Nicholson,* 71 Cal. App. 2d 538, 162 P. 2d 934, plaintiff sued on a contract to furnish equipment and labor for the performance of work in installing electric wiring and other equipment. Defendant set up the claim that such a contract, if entered into, was illegal and void as in violation of the regulations of the Office of Price Administration. At page 542, the court states:

> "Appellant's contention that the contract is in violation of the regulations of the Office of Price Administration by reason of the fact that it provided for charges for the use of respondent's equipment not allowed by said regulations, is not sustained by the rec-

ord. It is presumed 'that private transactions have been fair and regular' and 'that the law has been obeyed.' (Code of Civil Procedure Section 1963, Subdivision 19 and 33.) The contract is valid on its face. If facts existed that tended to prove its invalidity and to overcome the presumption, the burden rested upon appellant to prove such facts. He failed to do so."

In *Gelb v. Benjamin,* 78 Cal. App. 2d 881, 178 P. 2d 476, plaintiff sued for a bonus due him as manager of the Fresno branch of defendant's business. The defendant relied upon the defense that there was no agreement to pay this bonus and judgment went for the plaintiff. On appeal, the defendant for the first time set up a contention that the contract sued upon was contrary to the provisions of the Emergency Price Control Act of 1942, as amended, and that it was, therefore, illegal and unenforceable. Beginning at page 883, the court states:

"This defense is raised for the first time on appeal and it was in no way pleaded or presented in the trial court. The Price Control Regulations relied on contain a number of exceptions, and no evidence having been received in this connection, there is no evidence to indicate in any way that the facts of this case did not come within one or more of these exceptions. From a reading of these regulations it cannot certainly be said that any approval was necessary here.

"While the appellants contend that the question of illegality may be raised at any time, this is true only where the illegality clearly appears. The facts alleged in the complaint in this action do not show on their face that the contract sued upon was unlawful. Under such circumstances, *illegality is an affirmative defense that must be specially pleaded. Bernstein v. Downes,* 112 Cal. 197, 44 Pac. 557." (Emphasis added.)

IV.

No Evidence of Illegality of Contract Introduced.

In the instant case, no illegality is shown on the face of the contract nor has an affirmative defense of illegality been raised by amended answer, nor has evidence of illegality been introduced. The only evidence on the number of lugs in a car load of Emperor grapes is the evidence of the number of lugs that went into the replacement cars. The replacement car purchase from Simons & French Company contained 1100 lugs [Tr. p. 42]. The replacement cars purchased from A. Arena & Co., Ltd. each contained 1105 lugs [Tr. pp. 47 and 48]. If the court is willing to assume that the three cars to be supplied by Crane were each to contain 1100 lugs, this would make the commission to Crane amount to approximately 4½¢ per lug. We don't believe that the court is justified in making this assumption if the result is to declare the whole contract null and void. We submit that if the respondent Crane desires such a result, he was duty bound to submit evidence showing the number of crates that it was understood would be shipped in each of the three cars or to submit evidence of maximum and minimum loadings under the tariff regulations of the various loading points and destination points and the extent to which these were modified by emergency regulations during the war. This he did not do. Also M. P. R. 426, Section 13, provides for "adjustable pricing" under certain circumstances. There is no evidence that this case did not come within such an exception or any other exception to the maximum price regulation.

V.

Contract Could Not Exceed O. P. A. Price Regulation by More Than Six One Hundredths of One Per Cent.

If the court does feel justified in assuming that the contract contemplated cars of 1100 lugs each, and further feels justified in assuming the sale did not come within an exception to the $2.53 per lug maximum price, then $2.53 per lug amounted to $2,783.00 per car while the price to be charged Denunzio for a car of Emperor grapes plus commission (based upon this same assumption of 1100 lugs to a car) was $2,800.00 or a possible overcharge of $17.00. This is a maximum possible overcharge of approximately six one hundredths of one per cent. Respondent Crane is asking that the whole transaction be declared null and void because of such a minor, technical and unintentional overcharge.

VI.

The Emergency Price Control Act of 1942, as Amended, Sets Forth the Penalties for Its Violation. Such Penalties Do Not Include Unenforceability of a Contract in Violation Thereof.

(a) The Unenforceability of Contracts in Violation of Statute as Affected by Legislative Intent.

A contract in violation of the Emergency Price Control Act of 1942, as amended, is not unenforceable. The statute itself sets forth the remedies for such violation.

As pointed out by Judge O'Connor in his opinion in the instant case [Tr. p. 124] a contract in violation of a statute

is not necessarily void or unenforceable, and whether such a result is reached by the court depends upon its interpretation of the intent of the legislative body enacting the statute. In *Bentley v. Hurlbut,* 153 Cal. 796, 96 Pac. 890, the court quotes at page 801 from a decision of the United States Supreme Court as follows:

> "In *Harris v. Runnels,* 12 How. (U. S.) 79, 53 U. S. 79, 13 L. Ed. 901, the Supreme Court of the United States said: 'Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so.' While the statute here under consideration has not been construed by this court, statutes substantially similar have been brought for interpretation before the courts of other states. In a majority of the cases it has been held that a contract of sale made in violation of such a statute was not void, and that the vendor could recover the purchase price in an action on the contract."

Other cases supporting this proposition of law are:

Gammon v. Howard W. Scott, Inc., 4 Cir., 16 F. 2d 902;

Macco Construction Company v. Farr, 9 Cir., 137 F. 2d 52;

McBroom v. Scottish Mortgage & Land Investment Company, 153 U. S. 318, 323, 14 Sup. Ct. 852, 854, 38 L. Ed. 729.

(b) Legislative History of Emergency Price Control Act.

An examination of the legislative history of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A., Section 901 *et seq.*) shows that the House of Representatives' version of the bill provided a special section in which contracts in violation of the price ceilings established under the bill are "unenforceable." The Senate version of the bill did not contain this provision but contained four specific methods of enforcement of the Act: (1) injunction; (2) criminal penalties for wilful violations; (3) suit for damages; and (4) issuance of licenses and revocation thereof in case of more than one violation. After conference between the Senate and the House, the Senate version was adopted and was signed into law. The details of the history of the bill on this point are as follows:

The House report on its version of the bill is designated as "77th Congress, 2nd Session, House Report No. 1409, November 7, 1941." It can be found in Pike and Fischer, OPA Price Service—General Desk Book, Volume 1, as follows:

> "Mr. Steagall, from the Committee on Banking and Currency, submitted the following report to accompany H. R. 5990: . . .
>
> 'Contract Obligations.
>
> 'Section 206 makes *unenforceable* certain contracts and contract provisions inconsistent with, or conflicting with, or providing means of evasion of, price ceilings established under the provisions of the bill or established by the administrator of the Office of Price Administration and Civilian Supply.'" (Emphasis added.)

(Note that this Section 206 appearing in the House bill does not appear in the final version of the Act.)

The Senate report on its version of the bill is designated "77th Congress, 2nd Session, Senate Report No. 931, January 2, 1942." It can be found at page 1215 of Pike and Fischer, OPA Price Service, General Desk Book, Volume 1, as follows:

> "The House bill contained a provision making unlawful contracts requiring the payment of prices in excess of the maximum prices which had been established at the time such contracts were entered into or which were thereafter established. This the committee regarded as unduly restrictive, especially in connection with War and Navy Department contracts. *Accordingly, that provision has been deleted so that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices.*" (Emphasis added.)

The Senate version of the bill was adopted by the Congress and signed into law by the President. The section 206 of the House bill was deleted.

The legislation as it finally became law, then, provided, in the words of the Senate report, *supra,* "that all contracts are subject to whatever provisions regarding them are contained in the regulations or orders prescribing maximum prices."

The applicable regulation in the instant case—M. P. R. 426—"Fresh fruits and vegetables for table use, sales except at retail"—provides as follows:

> "Section 9, Enforcement. Persons violating any provisions of this regulation are subject to criminal

penalties, *civil enforcement actions,* suits for treble damages and proceedings for suspension of licenses provided by the Emergency Price Control Act of 1942, as amended." (Emphasis added.)

M. P. R. 426 does not declare void any contract for the sale of any commodity over ceiling price. See Section 7, M. P. R. 426.

(c) Decisions on Unenforceability of Contracts Under the Emergency Price Control Act.

Judge Carter, in his opinion on the case below, relied strongly upon the holding in *Morgan Ice Company v. Barfield,* Texas Civil Appeal 1945, 190 S. W. 2d 847. The *Morgan Ice Company* case was decided by one of the eleven Courts of Civil Appeal of Texas. It has been cited and distinguished by the Supreme Court of Texas (the ultimate court of appeal in Texas) in its decision in *Miller v. Long Bell Lumber Co.* (1949), 222 S. W. 2d 244.

In the *Long Bell Lumber Co.* case, the lumber company sued for lumber supplied the defendant on 550 invoices totaling $12,906.17. Miller defended upon the grounds that 61 of these invoices were over the applicable maximum price ceilings and that therefore (a) either the transactions as a whole were illegal and void, or (b) that the transactions involving the 61 invoices over ceiling prices were illegal and void. The court refused to declare any portion of the contract void, but did deduct from the amount due the total amount of the overcharge on these 61 items in the sum of $790.69.

The first thing that the court did was to distinguish those cases in which the contract indicated an intent to violate or evade the maximum price regulations from the *Long Bell* case which involved an incidental, unintentional

and minor violation in an otherwise legitimate business transaction. On this point, the court states at page 246 as follows:

> "There are two cases cited by petitioner by Courts of Civil Appeals in Texas which were decided upon certain violations of the regulations of the Office of Price Administration. *Morgan Ice Company v. Barfield,* Texas Civil Appeal, 190 Southwestern (2d) 847; *A. B. Lewis Co. v. Jackson,* Texas Civil Appeal, 199 Southwestern (2d) 853. In each of those cases the court refused to enforce the contract, which was held void under maximum price provisions of the Emergency Price Control Act, on the basis that in each case the parties entered into a contract which was in violation of the law. In the first case the contract was entered into in violation of the law and for the purpose of defeating the provisions of the statute; in the other case the court held that the transaction was fabricated and in violation of law. Relief was denied in each instance to the party seeking same. In the instant case the sale of merchandise in question was not illegal in itself. The illegality of the transaction, if any, consisted in the fact that an overcharge was made on certain specified articles of merchandise."

And at page 248, the court concludes as follows:

> "We are of the opinion that the Emergency Price Control Act considered as a whole cannot be construed to mean that in cases of an unintentional violation, as here, of some portion of its provisions by a transaction not inherently unlawful that any other penalty or forfeiture can be applied than that which is prescribed in the act. The general rule as to the nonenforceability of illegal contracts is not applicable; the illegality is not of that character which renders void the act done."

(d) Decisions on Enforceability of Contracts in Violation of Similarly Worded Statutes.

Probably the best statement of the law, and in a case most applicable to the instant one, is in *Macco Construction Co. v. Farr,* 137 F. 2d 52, decided by the Ninth Circuit in 1943. In this case the plaintiffs entered into an oral agreement to furnish four automobile trucks and personal services in their operation and the defendants agreed to hire the same for the entire duration of a certain grading and excavation project of defendants; thereafter the defendants without cause discharged the plaintiffs and refused to allow them to continue performance of the contract. On appeal, appellant Macco Construction Co.'s principal contention was that as a matter of law appellees were not entitled to recover because they had obtained no permit from the Railroad Commission of the State of California. Such a permit was required by virtue of the City Carriers Act No. 5134, Deering's General Laws of the State of California, Statutes of 1935, as amended.

At page 54, the court states:

> "The California City Carriers Act specifically provides penalties for its violation. Certain of these are denominated 'criminal penalties', Section 13, and others designated 'civil penalties', Section 14. Where the legislature thus particularly enumerated these penalties we must not assume that some others not named were intended to be included. The act does not declare that a contract entered into or executed between the parties which involved the use of highways in transporting materials was void because no permit had been secured."

Further at page 54, the court states:

"It is apparent that this contract was not entered into for any illegal purpose or with any understanding or intent to violate the law and hence is not *malum per se,* but appellant insists that the decisions of the California courts hold that where a statute provides a penalty for an act, a contract founded on such an act is void although the statute does not pronounce it void or expressly prohibit it, and cites in support of its position: *City of Los Angeles v. Waterson,* 8 Cal. App. (2d) 331, 48 Pac. (2d) 87; *Holm v. Bramwell,* 20 Cal. App. (2d) 332, 67 Pac. (2d) 114. The contracts in these cases cited, as a reading of the decisions shows, are very different from the one we are here considering. In the Waterson case, the contract was entered into fraudulently for the purpose of evading the law. . . . In *Holm v. Bramwell, supra,* there is involved the contractor's license law of California, Section 12 of which specifically provides: 'No person engaged in the business or acting in the capacity of a contractor as defined by Section 3 of this Act, shall bring or maintain any action in any court of this state for the collection of compensation for the performance of any act for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose.' . . . There is no such provision in the City Carriers Act No. 5134."

At page 56, the court concludes:

"It is always the purpose of the law to avoid absurdities, injustice and hardship. We may be sure it never was the legislative intent that beneficiaries of the violation, particularly if they themselves were instrumental in bringing about the breach, should thus be relieved from the just obligation of their contracts."

A case very much in point is *Bruce's Juices v. American Can Company,* 330 U. S. 743, 67 Sup. Ct. 1015, 91 L. Ed. 1219. This involved the enforcement of a contract claimed by the defendant to be in violation of the Robinson-Patman Act, 49 Statutes 1526, 1528; 15 U. S. C. A., Sections 13 and 13(a). Bruce was a canner who over a period of years bought its cans chiefly from the American Can Company. This suit was brought for the balance due. It was claimed that the American Can Company gave graduated discounts depending upon the number of cans bought and this was *per se* a violation of the Robinson-Patman Act. At page 750, the court, speaking through Justice Jackson, states:

> "The act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the act is made criminal and upon conviction a violator may be fined or imprisoned. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover three-fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. This triple damage provision to re-dress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."
>
> "It is contended that we should act judicially to add a sanction not provided by Congress by declaring the purchase price of goods uncollectible where the vendor has violated the act. It may be admitted as argued that such a sanction would be an effective enforcement provision. Addressed to Congress, this argument might be persuasive, but the very fact that it would obviously be an effective sanction makes it even more significant that the act made no provision for it;"

At page 755, the court further states:

> "This court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the court will entertain the defense that the contract in suit is illegal under the express provision of that statute. (Citing cases.) But when the contract sued upon is not intrinsically illegal, the court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the 'doctrine that where a statute creates a new offense and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' " (Citing cases.)

There have been many cases on whether sales in violation of licensing statutes are unenforceable. These cases are not directly applicable to the instant case in that the contract for sale involved herein was not in violation of any licensing provision of the Emergency Price Control Act—no licenses having been issued. The most recent annotation on this subject, however, is in 118 A. L. R. 646, in which the following statement appears:

> "In a considerable number of the recent cases, stress or reliance appears to be placed upon the absence of any specific provision declaring void or unenforceable a contract of an unlicensed person."

The case preceding the annotation is *Rosasco Creameries v. Cohan,* 118 A. L. R. 641, 276 N. Y. 274, 11 N. E. 2d 908. At page 644, the court states:

> "If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, Volume 3, Section 1789; Volume 5 (Second Edition), Section 1630. *Cf.* American Law Institute, Re-statement of the Law of Contracts, Sections 548, 600."

VII.

The Court May Use Its Discretion in Applying the Statutory Remedies Provided by the Emergency Price Control Act and a Fortiori May Use Its Discretion in Applying a Remedy Not Called for by the Statute.

During the course of the administration of the Emergency Price Control Act of 1942, as amended, the courts weighed the problem of whether they were required, upon the application of the administrator, to apply the statutory remedy sought by him or whether the courts had some discretion in the application of these remedies. The point was finally decided by the United States Supreme Court in *Hecht Co. v. Bowles,* 321 U. S. 321, 64 Sup. Ct. 587, 88 L. Ed. 754. In that case, the administrator had asked for an injunction against the department store in Washington, D. C. operated by the defendant. The District Court concluded that the "mistakes in pricing and listing were

all made in good faith and without intent to violate the regulations" and in the exercise of its discretion refused to grant an injunction (49 Fed. Supp. 528). On appeal, the Court of Appeals for the District of Columbia reversed that judgment holding that Section 205(a) of the Act required the issuance of an injunction or other order as a matter of course, once violations were found (137 F. 2d 689). On certiorari, the United States Supreme Court reversed the Court of Appeals for the District of Columbia on this point and at page 328 held:

> "It seems apparent on the face of Section 205(a) that there is some room for the exercise of discretion on the part of the court. . . . it would seem clear that the court might deem some 'other order' more appropriate for the evil at hand than the one which was sought. We cannot say that it lacks the power to make that choice. Thus it seems that Section 205 (a) falls short of making mandatory the issuance of an injunction merely because the administrator asks it."

There have been many lower court decisions in line with the decision of the Supreme Court in the *Hecht Co.* case.

In *Brown v. W. R. McNeil, Inc.,* 52 Fed. Supp. 485, the court held that what type of order should be issued upon a showing that a person has engaged or is about to engage in an act or practice in violation of Section 901 is discretionary with the District Court.

In *Brown v. Southwest Hotel,* 50 Fed. Supp. 147, the court held that although it was required to issue some or-

der, it was not necessarily required to issue an injunction and may exercise some discretion as to the type of order.

In *Bowles v. Virginia Hotel,* 55 Fed. Supp. 1013, the court in the exercise of its discretion refused to enjoin a hotel from charging rent for hotel rooms above maximum rent established, where the hotel owner had failed to make a proper entry of names of registration cards on less than 1% of the registrations made and the hotel owner had acted in good faith.

In *Bowles v. Arlington Furniture Company,* 148 F. 2d 467, it was held that the issuance of an injunction would constitute an abuse of discretion, where the seller and buyer of used woodworking machinery violated maximum price regulations but such violation was technical and largely as a result of an honest difference of opinion as to the proper interpretation of the regulation.

If the courts are clothed with such discretion in applying the statutory remedies provided by Congress for the enforcement of the Emergency Price Control Act, then certainly the courts have discretion in applying a remedy not called for by the Act. If the court in the exercise of its discretion may refuse to grant an injunction at the instance of the administrator, when such a remedy is specifically provided for under the Act, it can refuse to declare a contract unenforceable at the instance of the defaulting party, when such remedy is not provided for under the Act and does not appear proper under the circumstances.

VIII.

In Any Case the Contract Is Severable and the Legal Portion May Be Enforced.

In *Hedges v. Frink,* 174 Cal. 552 at page 554, 163 Pac. 884, the court states:

> "It is both familiar and declared law (Civil Code Sec. 1599) that where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, the contract is void as to the latter and valid as to the rest."
>
> See also *Poultry Producers v. Barlow,* 189 Cal. 278, 285, 208 Pac. 93.

Judge O'Connor states in his opinion [Tr. p. 126] as follows:

> "but assuming that counsel for Raymond M. Crane is correct in his contention that an entire and inseparable contract violating OPA ceiling prices would be illegal and unenforceable, *in toto* where one party was receiving the overcharge, it seems to the court that counsel loses sight of the fact that the contract here for the sale of grapes involved (1) Raymond M. Crane, acting in two different capacities, (2) at least two different subject matters, and (3) two different and separate considerations, each for a particular and separate purpose."

Judge Carter, while noting the right of a party to enforce the legal portion of a contract under California Civil Code, Section 1599, concluded [Tr. p. 168]:

> "There is no logical theory on which it can be said that the procurement fee alone was illegal and the contract for the grapes legal, anymore than the reverse could be said to be true, namely, that the

> procurement fee was legal and the price of the grapes illegal."

But brokerage is not earned unless the contract for sale is completed; a brokerage agreement is supplemental and additional to the contract of sale.

There can be a contract for the purchase of grapes without a contract for brokerage; there can be no contract for brokerage without a contract for sale. In the instant case, Crane purported to close a contract with Rains, Denunzio's broker, for three cars of Emperor grapes to be packed around October 8th to 10th, to remain in shipper's name until on or about December 10th, $750.00 per car deposit to be made upon receipt of confirmation from California by airmail—contingent upon cars grading U. S. No. One 28 lb. net new display lugs. This contract was not in violation of any OPA regulations. The supplemental contract providing for a $50.00 per car procurement charge was payable only if Crane performed under the primary contract and brought the principals (Denunzio and Crane) together in a contract of sale binding upon both principals. This Crane did not do [Tr. p. 148]. The law on this point is set forth in 4 Cal. Jur. 584 as follows:

> "The expression most commonly used in the books to describe the duty of the broker to perform the terms of his contract before his right to commission accrues is that he must be the procuring or inducing cause of the sale or purchase. The duty assumed by him is to bring buyer and seller to an agreement, *and until this is done his right to commission does not accrue.*" (Emphasis added.)

The brokerage is an additional sum payable if a contract binding upon the principals is completed.

In order to earn the commission, Crane was required to procure a customer on the terms authorized by Kazanjian. In 4 Cal. Jur. 593, the law on this point is stated as follows:

> "Where the broker is authorized to make a sale or procure a purchaser on certain specified terms, he has no authority to make a sale on other and different terms for the owner, and in the absence of express acceptance thereof by the owner, the broker has not earned, and cannot recover, his commission."

In *Andrews v. Waldo,* 205 Cal. 764, 272 Pac. 1052, plaintiff, as a broker, brought an action for recovery of his commission. The evidence showed that he had been appointed to sell the property at a specified price, payable in a stated sum in cash and the balance to be secured by a mortgage. The written contract of purchase as obtained by the broker provided for the cash payment and the balance secured by a mortgage, but gave the purchaser 30 days after notice from the owner that the escrow was ready to be closed within which to make the cash payment. The court granted a non-suit holding that the broker had not complied with the terms of the seller in that the cash was not payable immediately but only 30 days after close of escrow, and therefore the commission had not been earned.

From the above, two propositions of law are evident: (1) that a contract for a commission is supplemental to

and dependent upon the contract of sale, and (2) that if the contract of sale arranged by the broker is not within the terms of his authority from the seller, the commission is never earned.

It is apparent that the illegality, if any, in the transaction in the instant case was not in the price at which the grapes were offered and accepted, but in the supplemental agreement, that if Crane arranged a binding sale between his undisclosed principal and Denunzio, then Denunzio would also pay $50.00 per car to Crane. It was this added amount, if anything, which brought the total sales price above the maximum ceiling price. Of course, in any case, the brokerage was not earned (4 Cal. Jur. 485) and is not payable by Denunzio, but our point here is that its part in the transaction was that of a supplemental agreement to the primary agreement of sale and the amount involved in the brokerage was the amount that brought the transaction over the ceiling price (assuming that the total amount payable was over the ceiling price).

The brokerage being the excessive part of the transaction and representing a separate promise for a separate consideration should be severed from the agreement for the sale and purchase of the grapes at an admittedly legal price. (*Fitzgerald v. Union Central Life Insurance Co.*, (8th Cir., 1930), 42 F. 2d 76.)

Conclusion.

In conclusion, appellant Denunzio submits:

1. The legislative history of the Emergency Price Control Act of 1942, as amended, leads to the conclusion that Congress intended to expressly enumerate those penalties applicable for its violation; while the remedy of unenforceability was considered by Congress, it was not adopted. In the case of an inherently lawful transaction (as opposed to a conspiracy to violate the act which is *malum per se*) Congress did not intend such transaction to be unenforceable.

2. Where, as in the instant case, the contract is not unlawful on its face, the court will not presume or imply that it is contrary to statute and the burden is placed upon the party asserting its invalidity to plead and introduce evidence to prove that the total price exceeds the applicable maximum price ceiling and that the contract does not come within any exception thereto.

3. In the application of the enumerated remedies under the act, the courts are given discretion to apply or refuse to apply a given remedy, taking into consideration the magnitude of the violation, whether it was intentional or unintentional and whether it constituted a part of a conspiracy to violate the act or was a part of an inherently lawful transaction. Since the court has discretion in refusing to apply the enumerated penalties, it is clothed with even greater discretion in refusing to apply an additional penalty not enumerated in the act. Where, as here, the maximum possible violation is six one-hundredths

of one per cent over ceiling price and the violation, if any, is unintentional and as a part of a lawful transaction, Judge O'Connor, who heard the evidence, did not abuse his discretion in refusing to declare the contract unenforceable at the instance of the party in default and Judge Carter erred in declaring the contract unenforceable as a matter of law.

4. The transaction here involved comprises an agreement between the agent of an undisclosed principal and Denunzio to buy and sell grapes at under the ceiling price. The supplemental agreement is between the same agent and Denunzio, that if Crane concludes such a binding contract, Denunzio will pay him $50.00 per car. This brokerage agreement is supplemental to the making of the contract to buy and sell and consequently is the part of this transaction, if any, which exceeds the ceiling. Being severable, it should be severed, and the balance of the contract enforced.

Respectfully submitted,

Moss, Lyon & Dunn,
By George C. Lyon,
Attorneys for Appellant Joseph Denunzio Fruit Co.

APPENDIX.

Telegrams and Teletypes Passing Between Crane and Rains.

(Code words are written out and words are written in full instead of abbreviations.)

1. Night letter dated September 26, 1944, from Crane to various brokers, including A. B. Rains of Louisville, Ky.:

> "Can book Emperors—nine cars U S One and nine cars unclassified or 18 cars—Vineyard run grade—to go into storage—Packing to commence rate of one or two daily October 9th—We to personally inspect AFOHD (F.O.B. acceptance final) basis our inspection—Shipper to transfer title on or after December 10th he paying all storage charges. Packed 28# net—Display new lugs lidded—Calripe or comparable brand—$500 part payment with confirmation—price 2.53 net to shipper which ceiling that time—we charging 50.00 per car procurement charge—ADLAM (offered subject to confirmation) CORLU (wire immediately, must have answer) Thursday. ADLAS (offer subject to confirmation shipping point) immediate UPTMU (tomatoes 6 x 6 and larger—New crop Edson District—ALBIQ (approximately 85%) 3.25—Can secure 3-4 cars uninspected account (because of) heavy puff heavy sidewalls. Would grade AIBIEIQ (approximately 80-85%) except for puff which is not a serious defect account of heavy sidewall 2.50."

2. On September 28, 1944, the following teletype messages passed between Rains and Crane:

> *Rains to Crane*—OK on that Emperor deal—De nunzio cant use that many but will take 2 cars un-

classified to be shipped to Louisville when packed on the net delivered ceiling when shipped and 2 cars U S One to be stored there on your terms—To pay you 50.00 per car buying charges and Denunzio pays us our brokerage.

Crane to Rains—We will have to put that up to the shipper as deal was based exactly as we told you —By the way tomato market still good New York with quite heavy arrivals. Did 4.50 to 5.50 Calif., so get busy. Will let you know Emperors. End. Well idea is they dont like to store unclassified and unless grower is making something extra on the storage—Dont see any objections 500.00 per car deposit when confirmed—Get it pal and call us back teletype.

Rains to Crane—Denunzio has plenty of tomatoes at present but promise us first chance next one other not using car—Lots yet—End.

3. On September 28, 1944, Crane sent a night letter to Rains as follows:

Referring Emperors impossible make deal except as quoted our niteletter—DUPUR (how about) tomato business—others buying DUNNE (depending on you)—those we favor with grapes give us tomato business.

4. On October 2, 1944, Crane sent a telegram to Rains as follows:

PFGP (referring to our night letter of 26th) quoting Futures Emperors—secured revised deal—fifteen cars U S One 2.50 net—same deal—CORSD (wire quick if wanted) any part.

5. On October 2, 1944, the following teletype messages passed between Rains and Crane:

Rains to Crane—Grapes—your wire just received —confirm Krotzki Farms Louisville 3 cars—airmail contracts for them to sign and will forward airmail check for 15 hundred—Mark Denunzio Sr. operated on today so wont be able to see his son Buyer before morn but am sure they will take 4 or 5 so reserve least 10 for us—understand title wont pass until Dec. 10 but some of them could be shipped Dec. 1 or 2 so arrive time for Xmas.

Crane to Rains—That last remark we not sure believe we can arrange something like that but it would have to be handled carefully and be sure we were not violating any O.P.A. ceilings—However quite sure so long as deal based at ceiling as of Dec. 10th that it could be done—Why 15 hundred deposit —the deposit was 1000.00 per car although maybe get by with 750 per car. Also all confirmation is based selling entire lot which is a cinch.

Rains to Crane—Your original wire positively specified 500.00 car deposit—look it up—will work like heck on entire lot but your wire the AM (morning) said all or any part.

Crane to Rains—We said all or any part subject confirmation reason we figured nobody want entire 15 but we sure can sell all of it—means however we will have to do that. Now our wire reads.

Rains to Crane—Your wire 26 rite (right) in front me said 500.00 deposit written out not code and

would be hard as heck to change it now—You surely could allot us say 10 cars and sell the other 5 if we cant place—

Crane to Rains—We could do that alright also notice original wire said 500.00 car deposit that was an error but still think can work it out that basis—can you sell the balance of 10 that way and how soon could you let us know.

Rains to Crane—Be sure give us an option till tomorrow noon—sooner if possible but dont think be able contact Bud Denunzio today as he is at hospital with his Daddy.

Crane to Rains—Well we will keep our finger on 3-4 extra besides above and will wire definite confirmation or refusal within couple of hours above three. What about tomatoes.

Rains to Crane—No tomatoes yet until frost on—well (we will) tell grower you made error about deposit might stretch it to 750. if absolutely necessary end.

Crane to Rains—OKay we will figure 750.00 probably OKay end.

6. On October 2, 1944, Crane sent a night letter to Rains as follows:

Talked shipper Red Lyon Packing Company confirms Krotzki—necessary 750.00 car airmail deposits with signed confirmation Emperors—available now only two more cars possibly three same base CORDI DUNNE (answer first thing in the morning-depending on you) now all preference possible tomatoes as certainly been taking care you grapes.

7. On October 3rd the following teletype messages passed between Rains and Crane:

Rains to Crane—Grapes—Confirm Krotzki 2 cars instead of 3 Also confirm Denunzio 3 cars all U S One Emperors to be inspected when stored and air-mail inspection slips—They will put up the 750.00 deposits—Now of course contingent upon receiving inspection reports when stored.

Crane to Rains—OKay—That confirms total 5 cars 2.50 F.O.B. acceptance final 750.00 car deposit plus 50.00 procurement charge—Thanks—will airmail confirmation two copies for Buyers signature. What about tomatoes—first car arrived Kansas City—just now got color report—about 20 percent color coming up nice—fine car—can you place around 3.90 delivered basis—85 U S One or better except same puff.

Rains to Crane—Have made every effort—Just no interest tomatoes yet—still hot as H. here and home grown killing demand until frost. Do you have 1 more Emperor if we can place.

Crane to Rains—Nope thats all—However will advise if locate further supplies. The end.

Rains to Crane—They are in new lugs 28 net EH.

Crane to Rains—That right End.

Rains to Crane—OK will airmail checks with signed confirmation when receive your copies—Thanks End.

The following telegrams passed between Rains and Crane after "Memorandum of Sale":

Rains to Crane (October 9, 1944)

Reference our sales memo 2011 error change AOOAE (3 cars) instead AOOAD (2 cars). Quote UNDED (U. S. No. 1 straight pack) (tomatoes) CADOP (rolling just out or immediate shipment).

Crane to Rains (October 9, 1944)

Correcting number 2011 also terms AFOHD (F. O. B. acceptance final) CORQC (if you do not wire immediately to the contrary we will understand this is satisfactory) Emperors. No USONE available ADLAR (offer subject to confirmation delivered) DSPHQ (due at San Antonio, Texas) 3.15 ALBIQ (approximately 85%) (AMORI (about ¼ colored) 4666 similar later 3.25 AJYUX (every indication will not see lower prices, look for rising market).

Crane to Rains (October 10, 1944)

Shipper Redlion takes view account ceiling lifted any contracts Emperors voided willing go along give your trade preference shipping as packed at market price which today 3.25 AFOHD (F.O.B. acceptance final) advise.

Rains to Crane (October 11, 1944)

Baloney Emperors confirmed 2.50 net no mention ceiling Denunzio Krotzki demand shipment or fight him to end stop quote tokays.

Crane to Rains (October 11, 1944)

Contacting grower to get definite stand CORIH (will wire again as soon as can give definite information) Emperors.

Crane to Rains (October 11, 1944)

Please call us collect 10 AM our time tomorrow Tucker 3839 regarding Emperor deal.

Crane to Rains (October 12, 1944)

As final gesture and endeavoring to amicable settle grape contract Redlion Packing Company will sell basis 3.00 net FOB quantities specified on con-

tract buyer to pay us .10 pkge procurement—Quality is nice uninspected field-run but Redlion states in all probability fruit easily grade U S One arrival but not willing make this guarantee. Out (our) inspector has seen fruit says really beautiful if buyers wish we will arrange to put cars storage which we have already under contract otherwise Redlion takes attitude that after all he had nothing to do with ceiling. Feels he relieved all moral responsibility by making this offer. Claims turning down offers his entire outfit today basis 3.40 cash FOB.

Rains to Crane (October 13, 1944)

Sorry Denunzio advises they not interested attitude any growers or what position they taking—their contract for purchase 3 cars Emperors 2.50 FOB net made with Associated Fruit Distributors. They insist and will use all means available for fullfillment of contract. For your information if grapes were now 2.00 you or Redlion would insist on fulfillment contract Krotzkis attitude same.

Crane to Rains (October 13, 1944)

Useless Denunzio Krotzki take attitude we principals—could not legally charge procurement in that event, furthermore wired you niteletter when confirmed "Shipper Redlion Packing Company confirms" Furthermore we acting as agents DUNOR (doing everything possible) get settled amicably however DUMTA (as a matter of fact) until you get confirmation straightened out correct terms FOB acceptance final not FOB there really no deal DUTIH (we working) doing best possible.